

STATE OF WISCONSIN  
DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS

*In the Matter of the PECFA Claim of*

Grace Eidenberger  
Eidenberger Oil Company  
540 W. Grand Avenue  
Port Washington WI 53074

PECFA Claim #53074-9999-93 Hearing At 94-25

FINAL DECISION

The proposed decision of the administrative law judge in this case dated April 24, 1995, is hereby adopted with modifications as follows:

FINDINGS OF FACT

Proposed Findings of Fact 1 through 7 are hereby adopted Proposed Findings of Fact 8 and 9 are hereby deleted and replaced with the following findings of fact:

8. The cash receipt provided by the appellant, showing the cash payment from the appellant to the cleanup contractor, is not the functional equivalent of a cancelled check- In the absence of some third party documentation such as bank records showing withdrawal of \$4819.16 by the appellant and deposit of a similar amount by the cleanup contractor, the receipt is not an acceptable equivalent of a cancelled check.

9. The documentation offered by the appellant with regard to goods allegedly bartered to the cleanup contractor is not adequate to allow a determination of the wholesale value of those goods and to determine that the ownership of all the goods allegedly bartered actually changed hands. The PECFA program does not reimburse profit to the owner since the profit contained in the retail price of goods is not a cost which is necessary to the cleanup. The PECFA program will not reimburse for barter payments unless there is "absolute proof" the goods have actually been exchanged between the parties.

## CONCLUSIONS OF LAW

Proposed Conclusion of Law 1 is hereby adopted for purposes of the final decision. Conclusions 2 and 3 are deleted, and the following are substituted in their place for purposes of the final decision.

2. The appellant has not provided absolute proof of payment of \$17,383.59 to the cleanup contractor.

3. The appellant has not provided absolute proof of the wholesale value of the goods bartered to the cleanup contractor so as to establish eligibility for PECFA reimbursement.

## OPINION

I am adopting the basic conclusion of the administrative law judge that barter and cash payments can be reimbursed by the PECFA program, however I have modified the proposed decision substantially to conform to the statutory requirement that a claim include "Accounts, invoices, sales receipts or other records documenting actual eligible costs incurred because of the discharge" and the requirements of the administrative rule that the department not reimburse either for "Costs determined to be unrelated to remedial action activities" or for costs not supported by cancelled checks or other absolute proof of payment at time of submittal." § 101.143 (3)(f), Stats., and §ILHR 47.3 0(2), Wis. Adm. Code.

A portion of the disputed amount in this case was allegedly paid in cash. The administrative law judge found that a handwritten receipt on a form which was not pre-printed for the cleanup contractor's business was the "functional equivalent of a cancelled check" as required by the statute. I disagree for several reasons. First a cash payment of nearly \$5,000 is not a normal business practice. It is more common for a business entity to pay by check or money order to provide themselves with absolute proof of the payment. Where, as here, the payment's made by an owner in anticipation of filing a claim under a program which requires proof of payment in order to obtain reimbursement the use of a cash payment is even more unusual. Receipt books can be bought at any office supply store and are easily filled out to "document" payments, whether or not such payments have been made. At best, receipts signed by the owner or the contractors constitute a statement by one or both that the cash transaction has occurred- If mere statements had been deemed acceptable by the department the department's rule would not require "cancelled checks or other absolute proof of payment."

The administrative law judge felt that cash receipts "authenticated by both parties at the hearing" were "no more susceptible to forgery or fraud than a cancelled check" In the case of a check, however, the funds in an account maintained by a regulated financial institution having no involvement in the business arrangement between the owner and the cleanup contractor, are released upon presentation of the preprinted check imprinted with a variety of codes. The check is a negotiable instrument, and it is handled by the financial institution in such a way as to create independent documentation of the payment. The check itself provides evidence of who endorsed the instrument and the amount actually paid out by the financial institution to the endorser, There are a variety of pieces of information shown in the financial institution's stamps on the check which indicate the date payment was made and the exact amount of funds in the account which are released to the payee. This process, involving as it does the verification by an independent third party, is not the functional equivalent of a signed receipt between parties to a business transaction.

The issue of cash receipts has been dealt with previously in the appeal of Anne Marie Peters (PECFA Claim #54491-9795-97) issued October 4, 1994. In that case, the decision concluded that two

handwritten receipts for a cash payment which conflicted with other documentation were inadequate to establish the cash payment occurred. That decision concluded that the payment was not eligible for reimbursement 'since the current case does not have the conflicting documentation present' in the Peters case, it presents the more fundamental issue of what type of evidence is necessary to document a cash payment. Because of the need for "absolute proof of payment" under the administrative rule, I conclude that a cash payment cannot be verified solely by a receipt between the parties, even with testimonial authentication at a hearing. At a minimum, the claim filed with the department must also include documents such as a bank statement from a financial institution indicating that the owner or claimant withdrew the cash from an account and also documentation from a financial institution indicating that the cash was deposited by the alleged recipient. Cash payments in large amounts, such as the \$4,819.16, are unusual, and an assertion by the parties that the funds were neither withdrawn from an account nor deposited into one would be highly suspect.

With regard to barter payments through the exchange of goods, as occurred in this case, I agree with the administrative law judge that such payments can be reimbursed. In order for reimbursement to occur, however, there must be "absolute proof of payment" and also absolute proof of the value of the bartered good.

The first requirement means that there must be documentation proving that the ownership of the bartered good was transferred from the claimant to the contractor. In this case, sufficient proof is provided for a portion of the goods by the Department of Natural Resources registration of the vehicles in the contractor's name. Proving the transfer of ownership from the claimant to the contractor can be accomplished either through registration documents or through tax returns showing the acknowledgment of the barter by both the claimant and the recipient. Tax returns for the claimant alone would not be adequate as there is considerably more tax advantage to report the expense than the income involved in a barter transaction.

In this case, the administrative law judge accepted evidence of "blue book" type values for some of the goods and receipts showing retail values for others. Accepting retail value, whether using appraisals and guidebooks or manufacturer's suggested prices, as the appropriate measure of the value of the goods provides reimbursement at a level which both compensates the owner for his actual cost of obtaining the goods and also for a margin of profit. The PECFA program is not authorized to pay a profit to the owner. The owner's profit would be a cost unrelated to the remediation and ineligible for payment. The owner may only claim documented costs to himself net of any profit, manufacturer's rebates, or similar offsets to his actual costs. Furthermore, if the barter transaction creates a tax advantage which exceeds the tax deduction which would occur with a money payment, the PECFA program may only reimburse for the net value of the bartered goods minus that tax advantage. To assure all evidence is submitted with a claim to verify such net costs, the documentation must include a statement from the wholesaler or manufacturer attesting to the net cost of the item and a copy of the tax returns on which the expense deduction is claimed so that the value can be computed net of all direct and indirect profit on the goods. The tax documents might in an appropriate case, be unnecessary if there is independent verification from a CPA or tax preparer not affiliated with the owner that the value is net of any tax advantage which accrues from the barter transaction.

The proposed order of the administrative law judge, titled "PROPOSED DECISION" 'in the proposed hearing officer decision is hereby deleted. Because this case is one of first impression, the order provides the claimant with a period of time to submit the documentation described in this opinion for a recomputation of the eligible costs. The order also remands the appeal to the administrative law judge to retain jurisdiction until the department issues a decision based on that documentation and the claimant has an opportunity to appeal any decisions regarding the adequacy of the documentation submitted.

-NOW, therefore it is

### **ORDERED**

That this matter is remanded to the PECFA program to redetermine the eligibility of the \$17,383.59 in alleged payments by the claimant based on documentation already provided and any additional documentation the claimant submits within 30 days of the date of this decision. The claimant will have 30 days from the date of the department's decision on remand to, appeal. In the event of an appeal, this matter is to be remanded to the administrative law judge to take further testimony and to issue a proposed decision consistent with this decision.

### **NOTICE OF RIGHT TO APPEAL THIS DECISION**

#### **Request for Rehearing**

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of industry, Labor & Human Relations, Office of Legal Counsel, P. O. Box 7946, Madison, WI 53707-7946.

Send a copy of your request for a new hearing to the other parties named in the caption to this decision and any other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec.

227.49 of the state statutes

### Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The petition for Judicial review must be served on the Department of Industry, Labor and Human Relations, Office of Legal Counsel, 201 E. Washington Avenue, Room 400x, P. O. Box 7946, Madison, WI 53707-7946.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named as receiving copies of this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated and mailed: September 5, 1995.

Patrick J. Osborne  
Deputy Secretary

#### Parties 'm Interest:

Grace Eidenberger  
Michael Eidenberger  
Eidenberger Oil Company  
540 W. Grand Avenue  
Port Washington WI 53074

Ronald Seidl  
P O Box 726  
Mequon WI 53092

Howard Bernstein  
General Counsel  
DILHR  
P O Box 7946  
Madison WI 53707-7946

## HUMAN RELATIONS

IN THE MATTER OF: The claim for  
reimbursement under the PECFA  
Program by

Madison Hearing Office  
1801 Aberg Ave, Ste. A  
P.O. Box 7975  
Madison, Wisconsin  
53707-7975

Grace Eidenberger, d/b/a Eidenberger Oil Company

Re: PECFA Claim # 53074-9999-93

### PROPOSED HEARING OFFICER DECISION

#### NOTICE OFF RIGHTS

Attached are the proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to Madison Hearing office, P.O. Box 7975, Madison, Wisconsin 53707-7975. After the objection period, the hearing record will be provided to Patrick J. Osborne, Deputy Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the **FINAL** Decision of the Department of Industry, Labor and Human Relations in this matter.

STATE HEARING OFFICER:

DATED AND MAILED:

Karen L. Godshall

APRIL 24, 1995

Mailed To:

Michael Eidenberger  
Eidenberger Oil Company  
540 W. Grand Avenue  
Port Washington, WI 53074

Howard Bernstein  
General Counsel  
P.O. Box 7946  
Madison, WI 53707-7946

Ronald Seidl  
P.O. Box 726  
Mequon, WI 53092

In December of 1993, the Department of Industry, Labor and Human Relations indicated to the appellant its intention to deny payment for portions of a PECFA claim. An appealable order was subsequently issued, denying Eidenberger Oil Co. reimbursement in the amount of \$29,493.39 under the PECFA program. By letters dated December 20, 1993 and January 20, 1994, the appellant, by Mike Eidenberger, filed a timely appeal from that denial. After a series of preheating telephone conferences, a hearing on the matter was held on March 22, 1995, at Madison, Wisconsin, before Administrative Law Judge Karen L. Godshall, acting as a State Hearing Officer.

Based on the applicable records and evidence in this case, the state hearing officer makes the following

## PROPOSED FINDINGS OF FACT

1. The appellant, Grace Eidenberger, is and has been the legal owner of the business of Eidenberger Oil Company. The business premises of Eidenberger Oil Company remain under the ownership of the Eidenberger family, who now operate a business known as Yamaha of Port Washington, Inc., at that same location. The current business includes sales and service of motorcycles and recreational watercraft.

2. In late 1993, the appellants filed a claim for reimbursement of expenses associated with site cleanup at their premises. The Department of Industry, Labor and Human Relations made reimbursement to the appellants in the initial amount of \$147,583.06, together with a second payment of \$19,748-67. The Department denied payment for a series of expenses, including denying payment of costs in the amount of \$17,383.59 because those costs were not supported by cancelled checks.

3. The appellant appealed from the denial of the above costs, and also appealed from the denial of certain other minor reimbursements. During the course of prehearing conferences and hearing, the appellant limited its appeal to the denial of the \$17,383.59 costs. The other costs are no longer in dispute.

4. The costs for which the appellant seeks reimbursement represent costs of site work done by Ronald Seidl, doing business as AA Tank Removal. The appellants did not pay those costs by means of checks to Mr. Seidl and thus do not have cancelled checks to substantiate their payments.

5. The above costs were paid to Mr. Seidl through a combination of cash and bartered goods and services. The amount of \$4819.16 was paid to AA Tank in cash on April 21, 1992, and that payment is evidenced by a handwritten receipt of the same date, signed by Ronald Seidl.

Yamaha water vehicle, valued by the appellant at \$4226.50; repairs valued by the appellant at \$1973.53; and one 1992 water vehicle and trailer, valued by the appellant at \$5576.90, for a total of \$12,564.43 in goods and services.

In addition, Ronald

6. The values established by the appellant for the above goods and services are supported by dealer price lists, trade appraisal guides and similar documentation and represent reasonable retail prices, and by the testimony of the parties.

7. The Department has chosen not to reimburse for costs not supported by cancelled checks, under the administrative code provisions which exclude payment for "any costs not supported by cancelled checks or other absolute proof of payment at time of submittal". The Department further argues that barter transactions and cash transactions do not meet the requirement of "other absolute proof of payment".

8. The cash, receipt provided by the appellant, showing the cash payment from the appellant to the cleanup contractors', is the functional equivalent of a cancelled check, is no more susceptible to forgery or fraud than a cancelled check, and has been adequately authenticated by both parties at the hearing on this matter.

9. The documentation offered by the appellant is sufficient to allow determination of the amounts paid to the cleanup contractor by means of goods and services. This is not a case in which one party is trading its cleanup services for other services having no discernible market value, which is the danger of reimbursing for barter transactions in general. There is no evidence to suggest that the appellant has unreasonably inflated the value of the items and services bartered away so as to receive reimbursement in excess of costs actually incurred.

## PROPOSED CONCLUSIONS OF LAW

1. The appellant is the owner of a property which the Department has determined to be covered by the provisions of section 101.143 of the Wisconsin statutes, and is thus eligible for reimbursement of cleanup costs which are otherwise reimbursable under the above statute.
2. The sum of \$17,383.59 represents costs actually incurred by the appellant in making payment to the cleanup contractor, and those payments are supported by other absolute proof of payment, within the meaning of section 101.143 of the Wisconsin statutes and section ILHR 47.30(2)(a) of the Wisconsin Administrative Code-
3. The above costs were not properly deleted from the amount reimbursed to the appellant, within the meaning of the above provisions.

#### PROPOSED DECISION

The department's decision denying reimbursement to the appellant is modified to conform to the above findings of fact and conclusions of law and, as modified, is affirmed. Accordingly, the appellant is entitled to reimbursement of an additional amount of \$17,383.59, together with interest, if applicable. The balance of the reimbursement demanded by the appellant in its original appeal is denied.

Karen L. Godshall  
State Hearing Officer